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No. _____

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

**RICHARD P. CHRISTY, THOMAS B. GUTHRIE
and IRA PERKINS,**

Petitioners,

vs.

**DONALD P. HODEL, Secretary of the Interior
and**

**THE UNITED STATES DEPARTMENT OF INTERIOR
Respondents.**

**AMICUS CURIAE BRIEF OF MONTANA STOCKGROWERS
ASSOCIATION, MONTANA WOOL GROWERS
ASSOCIATION, IDAHO WOOL GROWERS ASSOCIATION,
WYOMING WOOL GROWERS ASSOCIATION, COLORADO
CATTLEMEN'S ASSOCIATION, NATIONAL CATTLEMEN'S
ASSOCIATION AND AMERICAN SHEEP INDUSTRY IN
SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

- I. Is the protection of one's property from imminent destruction by federally protected wildlife encompassed among the rights guaranteed by the Constitution of the United States of America?
- II. If such right is encompassed among those guaranteed by the Constitution, what is the appropriate level of review to be used in determining whether governmental proscription on its exercise meets Constitutional requirements?
- III. If such right is encompassed among those guaranteed by the Constitution, can the complete proscription of its exercise as contained in the Endangered Species Act and regulations promulgated thereunder satisfy the appropriate level of review?
- IV. Does the absolute prohibition of the right to protect one's property from imminent destruction contained in the Endangered Species Act and regulations, and the subsequent failure to compensate for the losses sustained therefrom constitute a taking in violation of the Fifth Amendment to the Constitution of the United States?
- V. Does the federal government's selection of a species of wildlife for protection and its proscription on the killing of such wildlife even in the immediate protection of one's property render such species an agent of the government for purposes of determining whether destruction of private property by such wildlife

constitutes governmental taking for Fifth Amendment purposes?

VI. Does governmental relocation of protected wildlife render such wildlife an agent of the government for purposes of determining whether any subsequent destruction of private property by such wildlife constitutes governmental taking for Fifth Amendment purposes?

VII. Did the Ninth Circuit err in upholding summary judgment based on the absence of any genuine issues of material fact when Petitioners had been precluded by order of the District Court from conducting any discovery to obtain such material facts?

LIST OF PARTIES

The parties named in the caption of this Petition are the same as those named in the proceedings below.

The *amicus curiae* are as follows:

MONTANA STOCKGROWERS ASSOCIATION
MONTANA WOOL GROWERS ASSOCIATION
IDAHO WOOL GROWERS ASSOCIATION
WYOMING WOOL GROWERS ASSOCIATION
COLORADO CATTLEMENS' ASSOCIATION
NATIONAL CATTLEMENS' ASSOCIATION
AMERICAN SHEEP INDUSTRY

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CATTLEMENS' ASSOCIATION AND AMERICAN
SHEEP INDUSTRY IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

The amicus curiae respectfully support the petition for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 21, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 857 F.2d 1324 and is reprinted in the Appendix to the Petition for Writ of Certiorari at p. 6a. The memorandum and order of the United States District Court for the District of Montana (Hatfield, D.J.) was not reported. It is reprinted in the Appendix at p.2a.

JURISDICTION

Petitioners brought this action in the District of Montana, invoking federal court jurisdiction under 16 U.S.C. §1540; 28 U.S.C. §1346(a)(2); 28 U.S.C. §1331; and 5 U.S.C. §702. On May 4, 1987, the United States District Court, Montana District granted Respondents' Motion for Summary Judgment and entered judgment thereon. [p.1a]

Petitioners appealed to the Ninth Circuit and on September 21, 1988, the Ninth Circuit affirmed the Order of the District of Montana and entered Judgment. Petitioners timely filed a Petition for Rehearing, which Petition was denied by the Ninth Circuit on November 3, 1988. [p.33a]

On January 9, 1989, Petitioners filed an Application for Extension of Time in which to file this Petition up to and including March 3, 1989, on the ground that one of the counsel for Petitioners had been injured. By Order of this Court dated January 12, 1989, this extension was granted.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

The parties have stipulated to amicus curiae filing of this brief in support of the Petition for the Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The due process and just compensation clauses of the Fifth Amendment to the United States Constitution, the provisions of which are printed at p. 56a.¹

The following sections of the Endangered Species Act, the pertinent provisions of which are printed at p. 57a -p. 59a:

16 U.S.C. §1531(a) and (b)

16 U.S.C. §1532(6), (19) and (20)

16 U.S.C. §1533(d)

16 U.S.C. §1538(a)(1)(B)

50 C.F.R. §17.40(b), the pertinent provisions of which are printed at p. 60a.

STATEMENT OF CASE

The parties amicus agree with the Statement of Case set forth in the Petition for Writ of Certiorari in this matter.

REASONS FOR GRANTING THE WRIT

I. Introduction

The parties amicus, Montana Stockgrowers Association, Montana Wool Growers Association, Idaho Wool Growers Association, Wyoming Wool Growers Association, Colorado Cattlemen's Association, National Cattlemen's Association and American Sheep Industry representing the interest of some 32,570 members engaged in the livestock industry pray this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above-entitled proceeding entered on September 21, 1988. The amicus support the petition filed by Richard P. Christy, Thomas B. Guthrie and Ira Perkins.

Livestock predation by wild animals is one of the risks raising livestock, sheep or cattle, in the mountain west states. In an industry where the profit margins are narrow and where the rancher has little control over either the cost of production or the market value of the product, uncontrolled losses of sheep or cattle quickly jeopardize the economic viability of a ranch unit. Where livestock are threatened by predator losses, it is not merely the lives of the animals themselves which are at stake, but it is the very real ability to continue as an operating unit which is threatened through such losses.

1. The Fourteenth Amendment to the United States Constitution applies by its own terms only to state and local governments. There is no equal protection clause that governs the actions of the federal government, such as those under consideration in this case. The cases have held however that if the federal government classifies individuals in a way which would violate the equal protection clause of the Fourteenth Amendment, it will be held to contravene the due process clause of the Fifth Amendment. These standards for validity under the due process and equal protection clauses are identical. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

II. Private Property Owners Can Defend Their Property From Destruction

The present case advances facts which demonstrate a taking has occurred. The petitioners all are or were engaged in the sheep industry. Each petitioner had experienced a confrontation between a flock of sheep and a marauding grizzly bear. If any predator other than a grizzly bear were involved, the sheepman could respond to defend the life of his sheep and economic integrity of his ranching unit. That is true whether the predator was a coyote, black bear, lynx, mountain lion or bobcat. Section 87-1-225, MCA; Section 87-3-130, MCA.

In the present instance, however, where a grizzly bear commences grazing on a flock of sheep, the result and outcome changed. The Secretary of Interior has listed the grizzly bear as an endangered and threatened species and prohibited the taking of such animals, except under limited circumstances for individual self defense, by game officials or for limited sport kills. 16 U.S.C. §1533(a)(1); 16 U.S.C. §1532(6), (19), and (20); 50 C.F.R. §17.40(b).

Where a private property owner is forced to experience loss of property, the destruction of sheep or cattle, without a opportunity to defend the property and where the destruction and inability to defend property exists only as to federally protected animals, but not otherwise, a federal taking has occurred and compensation is required. Basically, the destruction of private property which has commercial value by a species protected by the Federal Government constitutes a federal taking entitling the owner to compensation for the loss.

The only way to avoid the conclusion that a taking has occurred and compensation required is to find, as Petitioners above urge, that a Constitutional right exists to protect property from imminent destruction by destroying wild animals then engaged in livestock predication. The Fifth Amendment to the United States Constitution will provide:

nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The right to obtain and possess property, recognized by the United States Constitution, is without meaning, unless the property owner has the right to prevent imminent destruction of the property. Without the recognition of such concomitant right, possession of property is subject to defeasance by the whim and caprice of others. A right to own property without recognition of the right to protect property, diminishes and destroys this right of ownership. Such right to own property becomes no longer an absolute right. Property ownership then becomes a privilege subject to the actions of others and relying upon the inaction of others for its preservation. A right which cannot be defended is no right at all.

The present case demonstrates a clear instance where either a constitutional right, the pursuit and possession of property is given meaning by allowing a person to take appropriate steps to prevent destruction of the property, or where this provision, though mentioned in the Constitution, becomes meaningless.

III. Compensation is Required For a Federal Taking

Finally, even if this Court refuses to find a Constitutional right exists to kill protected species which are then engaged in the probable destruction of property, the Court should at the very least, find the event was a Governmental taking which requires compensation.

A taking of property occurs, within the Constitution, under circumstances such as livestock predication presented in this case, and because such taking has occurred, compensation is required. The taking in the Constitutional sense occurs not only when property, real or personal, is seized by eminent domain, but also when land is destroyed or permanently damaged by the acts of a governmental body. **U.S. v. Kansas Life Ins. Co.**, 339 U.S. 799, 70 S.Ct. 885, 94 L.Ed. 1277; **U.S. v. Lynah**, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539.

There is no question that a taking has occurred through the destruction of sheep by a governmentally protected species. While there may be public benefit to having grizzly bears roam free in the wild, it is only the petitioners and the class of businessmen within the organizations who appear as *amicus curiae* who bear the brunt of this animal's destructive nature and are unable to protect their property from destruction. Admittedly individuals may confront a grizzly bear in the wild, however those individuals can respond and through self-protection destroy the grizzly bear (50 C.F.R. § 17.40(b)). Virtually any other business in an area habituated by grizzly bears will either be undisturbed by the bear or will be able to respond and defend against such predator attacks if those attacks are directed at employees.

The sheep and cattle industry is unique. Occupying terrain where grizzly bears range, either naturally or as transplants from other areas, the sheepmen and cattlemen rightfully bring to the area domestic animals which attract grizzly bears. Throughout the western states the sheep and cattle industry front against and range within areas occupied by grizzly bear.

To the livestock owners, these deprivations of a herd or flock is a direct loss of income producing property and is a loss which is unpredictable and unpreventable. Since a policy decision has been made which allows these bears to roam free and unregulated, this group alone bears a burden, the prospect of animal loss, which should be borne by all of the public as a whole and not a small class of individuals of whom petitioners and *amicus* are a part thereof. If, for public policy reasons, and to preserve the grizzly bear this court will not recognize the limited right to kill grizzly bears which are attacking private property, this court nonetheless should recognize that the destruction of private property by an endangered or threatened species is a taking which requires just compensation to be paid by the Federal Government.

CONCLUSION

For the foregoing reasons, and for the reasons otherwise set forth in the Petition for a Writ of Certiorari, the Amicus Curiae herein respectfully urge this Court to grant the Petition for a writ of certiorari in this matter.

Respectfully submitted this 31 day of March, 1989.

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CERTIFICATE OF SERVICE

I, Ronald F. Waterman, one of the attorneys for Amicus Curiae in the in the above-entitled action, do hereby certify that a copy of the foregoing Brief was mailed, postage fully prepaid thereon at Helena, Montana, on the 31 day of March, 1989, and directed to:

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